

CLASS I
NON-EXCLUSIVE
FRANCHISE AGREEMENT
BETWEEN THE
CITY OF SAN DIEGO
AND
FOR
SOLID WASTE
MANAGEMENT SERVICES

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RECITALS

This Class I Non-Exclusive Franchise Agreement (Agreement) is entered into by and between the City of San Diego (City) and Express Waste & Recycling, Inc. (Franchisee), for the collection and subsequent transfer, transportation, recycling, processing, and disposal of solid waste and other services.

Recitals

WHEREAS, the Legislature of the State of California, by enactment of the California Integrated Waste Management Act of 1989 (AB 939) (California Public Resources Code Section 40000 et seq.), has declared that it is in the public interest to authorize and require local agencies to make adequate provisions for Solid Waste handling within their jurisdictions; and,

WHEREAS, pursuant to California Public Resources Code Section 40059(a)(2) and City Charter Section 103, the City Council of City has determined that the public health, safety, and well-being require that non-exclusive franchises be awarded to qualified companies for the collection and subsequent transfer, transportation, recycling, processing, and disposal of Solid Waste and other related services. Therefore, one purpose of this Agreement is to regulate such Franchise in order to ensure its orderly operation, and to minimize the potential for adverse effects it may have on the local environment; and,

WHEREAS, the City requires all haulers providing solid waste services in the City to obtain a non-exclusive franchise agreement in order to regulate this business, ensure its orderly operation and to minimize the potential for adverse effects it may have on local City government; and,

WHEREAS, the City desires to have a variety of solid waste collection firms that San Diego businesses may choose among for the provision of Solid Waste services at competitive pricing; and,

WHEREAS, by Ordinance No. 00-18849-7, adopted on September 18, 2000, the City Council approved the award of a non-exclusive solid waste collection franchise to Express Waste & Roll Off Services, L.L.C. Franchisee has applied to the City for, and Express Waste & Roll Off Services has consented to, the transfer of that franchise from Express Waste & Roll Off Services to Franchisee. See Consent To Transfer Of Solid Waste Collection Franchise And Waiver & Release attached hereto and incorporated herein by reference as Exhibit "A."

WHEREAS, the City intends to receive value for the franchise issued; and,

WHEREAS, Franchisee agrees to and acknowledges that it shall arrange for the proper disposal of all Solid Waste collected in City and City is not instructing Franchisee how to collect Solid Waste.

NOW, THEREFORE, in consideration of the premise above stated and the terms, conditions, covenants and agreements contained herein, the parties do hereby agree as follows:

ARTICLE 1 DEFINITIONS

1.1 AB 939

“AB 939” means the California Integrated Waste Management Act of 1989 (California Public Resources Code Section 40000 et seq.), as it may be amended from time to time.

1.2 Affiliate

“Affiliate” means all businesses (including corporations, limited and general partnerships and sole proprietorships) which are directly or indirectly related to Franchisee by virtue of direct or indirect ownership interest or common management. An Affiliate shall include a business in which Franchisee owns a direct or indirect ownership interest, a business which has a direct or indirect ownership interest in Franchisee and/or a business which is also owned, controlled or managed by any business or individual which has a direct or indirect ownership interest in Franchisee. For purposes of determining whether an indirect ownership interest exists, the constructive ownership provisions of Section 318(a) of the Internal Revenue Code of 1986, as in effect on the date of this Agreement, shall apply; provided, however, that (i) “ten percent (10%)” shall be substituted for “fifty percent (50%)” in Section 318(a)(2)(C) and in Section 318(a)(3)(C) thereof; and (ii) Section 318(a)(5)(C) shall be disregarded. For purposes of determining ownership under this paragraph and constructive or indirect ownership under Section 318(a), ownership interest of less than ten percent (10%) shall be disregarded and percentage interests shall be determined on the basis of the percentage of voting interest or value which the ownership interest represents, whichever is greater.

1.3 Agreement

“Agreement” means this Class I Non-Exclusive Franchise Agreement between City and Franchisee for the collection, and subsequent transfer, transportation, recycling, processing and disposal of commercial and industrial and certain residential solid waste, including all exhibits and attachments, and any amendments thereto.

1.4 California Integrated Waste Management Act

“California Integrated Waste Management Act” means Public Resources Code, Section 40000 et seq.

1.5 City and City Council

“City” means City of San Diego, a municipal corporation, and all the territory lying within the municipal boundaries of City as presently existing or as such boundaries may be modified during the term of this Agreement and its employees as described in Section 10.13. “City Council” means the eight (8) elected council members of the City.

1.6 Collect/Collection

“Collect” or “Collection” means to take physical possession and transport Solid Waste within the City.

1.7 Designated Waste

“Designated Waste” shall be defined in accordance with California Water Code section 13173 as it exists on the Effective Date of this Agreement and as it may be amended from time to time.

1.8 Director

“Director” shall mean The City of San Diego, Environmental Services Director or a duly authorized representative.

1.9 Disposal

“Disposal” means the final disposition of any Solid Waste collected by Franchisee at a permitted landfill or other permitted Solid Waste Facility.

1.10 Disposal Site(s)

“Disposal Site(s)” means the permitted solid waste handling Facility or Facilities for the ultimate disposal of Solid Waste collected by Franchisee.

1.11 Environmental Laws

“Environmental Laws” means all federal and state statutes, county, local and City ordinances concerning public health, safety and the environment including by way of example and not limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq.; the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; the Occupational Safety and Health Act, 29 U.S.C. §.651 et seq.; the California Hazardous Waste Control Act, California Health and Safety Code § 25100 et seq.; the Porter Cologne Water Quality Control Act, California Water Code § 13000 et seq.; the Safe Drinking Water and Toxic Enforcement Act, California Health and Safety Code 25249.5 et seq.; as currently in force or as hereafter amended, and all rules and regulations promulgated thereunder.

1.12 Facility

“Facility” means any plant or site, owned, leased, maintained, operated or used by Franchisee for purposes of performing under this Agreement

1.13 Franchise

“Franchise” means the special right granted by City under this Agreement to operate as a nonexclusive enterprise for Solid Waste collection services within the City. Franchise includes Class I and Class II Franchises. A Class I Franchise is a non-exclusive Franchise granted to a Franchisee that collects less than 75,000 tons of Refuse per year within the City. For the purpose of determining eligibility to be granted a Class I Franchise, the annual tonnage of refuse collected in the City by that enterprise, its parent company and all affiliates shall be combined. A Class II Franchise is a non-exclusive Franchise granted to a Franchisee that collects more than 75,000 tons of Refuse per year within the City.

1.14 Franchisee

“Franchisee” shall mean any person or business that holds a valid, un-revoked, and un-expired City granted non-exclusive Class I or Class II Franchise to operate on public property an enterprise for the collection of subsequent transportation or disposal of solid waste within the City.

1.15 Hazardous Substance

“Hazardous Substance” shall mean any of the following: (a) any substances defined, regulated or listed (directly or by reference) as “Hazardous Substances”, “hazardous materials”, “Hazardous Wastes”, “toxic waste”, “pollutant” or “toxic substances” or similarly identified as hazardous to human health or the environment in or pursuant to (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 et seq.; (ii) the Hazardous Materials Transportation Act, 49 U.S.C. § 5101, et seq.; (iii) the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; (iv) the Clean Water Act, 33 U.S.C. § 1251 et seq.; (v) California Health and Safety Code §§ 25115-25117, 25249.8, 25281, and 25316; (vi) the Clean Air Act, 42 U.S.C. § 7401 et seq.; and (vii) California Water Code §13050; (b) any amendments, rules or regulations promulgated thereunder to such enumerated statutes or acts currently existing or hereafter enacted; and (c) any other hazardous or toxic substance, material, chemical, waste or pollutant identified as hazardous or toxic or regulated under any other applicable federal, state or local environmental laws currently existing or hereinafter enacted, including, without limitations, friable asbestos, polychlorinated biphenyls (“PCBs”), petroleum, natural gas, and synthetic fuel products and by-products.

1.16 Hazardous Waste

“Hazardous Waste” means all substances defined as Hazardous Waste, acutely Hazardous Waste, or extremely Hazardous Waste by the State of California in Health and Safety Code §25110.02, §25115, and §25117 or in the future amendments to or remodifications of such statutes or identified and listed as Hazardous Waste by the US Environmental Protection Agency, pursuant to the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), all future amendments thereto, and all rules and regulations promulgated thereunder.

1.17 Manager

“Manager” shall mean the City Manager of the City of San Diego, or a duly authorized representative, who may also be the Environmental Services Director except in the case of all appeals of the Director’s decision.

1.18 Materials Recovery Facility (MRF)

“Materials Recovery Facility” means a permitted facility where Solid Waste is sorted or separated for the purpose of recycling or reuse.

1.19 Medical Waste

“Medical Waste” means any Solid Waste which is generated or has been used in the diagnosis, treatment or immunization of human beings or animals, or research pertaining thereto, and shall include but not be limited to bio-hazardous and Medical Waste, or other Solid Waste as defined

by Chapter 12 of the County Code of Regulatory Ordinances and/or state and federal law.

1.20 Multi-Family Dwelling Unit

“Multi-Family Dwelling Unit” means any premises, four units or more, that is serviced in a manner similar to commercial and industrial property (bin or debris box), but used for residential purposes (not including hotels or motels), irrespective of whether residence therein is transient, temporary or permanent.

1.21 Person

“Person” means any individual, firm, association, organization, partnership, corporation, business trust, joint venture, the United States, the State of California, the City and County of San Diego, towns, cities, and special purpose districts.

1.22 Premises

“Premises” means any land, or building in City where Solid Waste is generated or accumulated.

1.23 Recyclable

“Recyclable” means a material which can be processed into a form suitable for reuse through reprocessing or re-manufacture consistent with the requirements of the California Integrated Waste Management Act.

1.24 Recyclable Materials

“Recyclable Materials” means residential, commercial or industrial source separated by - products of some potential economic value, set aside, handled, packaged, or offered for collection in a manner different from refuse.

1.25 Recycle/Recycling

“Recycle” or “Recycling” means the process of separating for collection, collecting, treating and/or reconstituting recyclables which would otherwise be discarded without receiving compensation and returning them to the economy in the form of raw materials for new, reused, or reconstituted products. The collection, transportation or disposal of Solid Waste not intended for, or capable of, reuse is not Recycling. For purposes of this Agreement, Recycling does not include use of Solid Waste for conversion to energy.

1.26 Recyclable Materials Collector

“Recyclable Materials Collector” means an enterprise that collects Recyclable Materials within the City. A Recyclable Materials collector shall not be authorized to collect any material that contains greater than ten (10) percent Solid Waste by volume.

1.27 Refuse

“Refuse” means any mixture of putrescible and non-putrescible solid and semi-solid wastes, including garbage, trash, residential refuse as defined herein and in Section 66.0127 of the San Diego Municipal Code, industrial and commercial solid waste, vegetable or animal solid and semi-solid wastes, and other solid waste destined for disposal sites.

1.28 Refuse Collector

“Refuse Collector” means an enterprise whose primary business within the City of San Diego is to collect and dispose of refuse.

1.29 Residential Refuse

“Residential Refuse” means that refuse which the City is required to collect pursuant to San Diego Municipal Code Section 66.0127 from residents on public streets and those private streets for which there is a valid hold harmless agreement.

1.30 Self-hauled Waste

“Self-Hauled Waste” means any mixture of Solid Waste which is generated by a residence, or is generated as part of a business activity, and which is collected and transported by that same resident or business.

1.31 Solid Waste

“Solid Waste” means all putrescible and non-putrescible solid and semi-solid waste, including garbage, trash, refuse, rubbish, demolition and construction waste, metallic discards, non-source separated green waste or animal solid or semi-solid wastes and other solid and semi-solid wastes. For the purposes of this Agreement, Solid Waste does not include Medical Waste, Recyclable Materials, Hazardous Waste or Hazardous Substance.

1.32 Waste Generator

“Waste Generator” means any person as defined by Section 40170 of the California Public Resources Code, whose act or process produces solid waste as defined in California Public Resources Code Section 40191, or whose act first causes solid waste to become subject to regulation.

ARTICLE 2 REPRESENTATIONS AND WARRANTIES OF THE FRANCHISEE

2.1 Corporate Status

Franchisee is an enterprise duly organized, validly existing and in good standing under the laws of the State of California. It is qualified to transact business in the State of California, maintains a valid City business license and has the corporate power to own its properties and to carry on its business as required by this Agreement.

2.2 Corporate Authorization

Franchisee has the authority to enter into and perform its obligations under this Agreement. The Board of Directors of Franchisee (or the owner or shareholders if necessary) have taken all actions required by law, its articles of incorporation, its bylaws or otherwise to authorize the execution of this Agreement. The person signing this Agreement on behalf of Franchisee has authority to do so.

ARTICLE 3 TERM OF AGREEMENT

3.1 Grant and Acceptance of Franchise

Subject to Section 3.5, City hereby grants to Franchisee a non-exclusive Class I Franchise, with the right and privilege to use the City streets and right-of-ways to collect and subsequently transfer, transport, recycle, process, and dispose of a maximum of 75,000 tons per year of Solid Waste accumulating in City that is offered for collection to Franchisee in accordance with this Agreement and the San Diego Municipal Code.

The grant of authority to collect Solid Waste is limited by San Diego Municipal Code Section 66.0127 which requires the City of San Diego to collect certain Solid Waste.

Franchisee hereby accepts the Franchise on the terms and conditions set forth in this Agreement.

3.2 Effective Date of Agreement and Term of Franchise

The effective date of this Agreement shall be the date that the last party to execute this Agreement signs it. **[Effective Date]**. The term of this Franchise granted to Franchisee shall be from the Effective Date of this Agreement through June 30, 2013, inclusive. The term of this Agreement shall coincide with the term of the Franchise granted to Franchisee. Any separate agreements between Franchisee and its customers shall automatically terminate upon the termination of this Agreement.

3.3 Extension Term

Beginning on July 1, 2008, and every five (5) years thereafter, a five (5) year extension shall be applied to the term of this Franchise, upon approval of the City Council by ordinance, so that the remaining term of the Franchise shall be ten (10) years, unless otherwise terminated in accordance with this Agreement. The City reserves the right to meet and confer with the Franchisee to revise the terms of the Agreement and any amendments thereto at the beginning of every Fiscal Year (July 1). The extension, if any, shall be contingent upon, among other things, the Franchisee having satisfied all performance requirements of the Agreement including, but not limited to, having provided the City with all required documents and having brought all franchise fee accounts and other accounts with the City current.

If Franchisee does not agree with the revised terms of the Agreement, then Franchisee will have the right to a public hearing by the City Council regarding the contractual dispute. (See Section 9.2 for procedural requirements to have matter heard by City Council.)

3.4 Conditions to Effectiveness of Agreement

The obligation of City to permit this Agreement to become effective and to perform its undertakings provided for in this Agreement is subject to Franchisee's satisfaction of each and all of the conditions set out in A - D below, each of which may be waived in whole or in part by the City.

- A. *Accuracy of Representations.* The representation and warranties made by Franchisee in Article 2 of this Agreement are true and correct on and as of the Effective Date.
- B. *Absence of Litigation.* There is no litigation pending on the Effective Date in any court challenging the award or execution of this Agreement or seeking to restrain or enjoin its performance.
- C. *Furnishing of Insurance and Bonds.* Franchisee has furnished evidence of the Insurance and bonds required by Article 8 of this Agreement.
- D. *Effectiveness of City Council Action.* City's Ordinance authorizing the City Manager to execute this Agreement shall have become effective pursuant to California law prior to the Effective Date.

3.5 Limitations to Scope

This Franchise shall not include the categories of Solid Waste listed in this section. The granting of this Franchise shall not preclude the categories of solid waste listed below from being delivered to or collected and transported by others provided that nothing in this Agreement is intended to or shall be construed to excuse any person from obtaining any authorization from City which is otherwise required by law:

- A. All residential refuse collected on public streets in the City, which the City is obligated to collect under Municipal Code Section 66.0127.
- B. Residential refuse collected on private streets for which there is a valid hold harmless agreement to provide such service, as described in Municipal Code Section 66.0127.
- C. All recyclable materials as defined in Section 1.24 of this Agreement.
- D. Containers delivered for recycling under the California Beverage Container Recycling Litter Reduction Act, California Public Resources Code, §14500, et seq.
- E. Green material removed from a premises by a gardening, landscaping, or tree trimming contractor as an incidental part of a total service offered by that contractor rather than as a hauling service.
- F. Solid Waste that is generated at any premises and which is removed and transported personally by the owner or occupant of such premises (or by his/her other full-time employees) to a licensed Solid Waste management facility, transfer station or disposal site in a manner consistent with the San Diego Municipal Code and other applicable laws.
- G. Construction and demolition waste or debris removed from a premises by a licensed demolition or construction contractor using its own employees and its own or rented equipment as an incidental part of a total service offered by that contractor rather than as

a hauling service. (Except any construction and demolition debris collected by a Franchisee, including all construction and demolition debris collected by Franchisee on behalf of a construction or demolition contractor, shall be subject to the Franchise Fee, unless the material is source separated for Recycling and hauled directly from the point of generation to a construction and demolition Recycling facility. Construction and demolition debris collected and transported to a disposal facility, a materials recovery facility or any other facility where the material is subsequently sorted or separated from other Solid Waste for recycling or reuse, is considered Solid Waste and subject to the Franchise Fee.)

- H. Hazardous Waste, Medical Waste and Designated Waste, regardless of its source.
- I. By-products of sewage treatment, including sludge, sludge ash, grit, and screenings.
- J. Residue or non-processible waste from a Solid Waste management facility, including materials recovery, compositing, and transformation facilities.
- K. Animal waste and remains for use as tallow.
- L. Municipal corporations and other governmental agencies using their own vehicles engaged in the collection and subsequent transportation or disposal of Solid Waste within the City.

Franchisee acknowledges and agrees that City may permit other persons besides Franchisee to collect any or all types of Solid Waste, including those listed in this section without seeking or obtaining approval of Franchisee under this Agreement.

This grant to Franchisee of a Class I Non-Exclusive Franchise, with the right and privilege to collect and subsequently transport, process and dispose of Solid Waste shall be interpreted to be consistent with state and federal laws, now and during the term of the Franchise. The scope of this non-exclusive Franchise shall be limited by current and developing state and federal laws with regard to Solid Waste handling, franchising, Solid Waste flow control, and related doctrines. In the event that future interpretations of current law, enactment of new laws or developing legal trends limit the ability of the City to lawfully franchise the scope of services as specifically set forth herein, Franchisee agrees that the scope of the Franchise will be limited to those services which may be lawfully provided for under this Agreement.

3.6 Ownership of Solid Waste

Once Solid Waste is placed in containers and the containers are properly placed for collection, ownership and the right to possession shall transfer directly from the waste generator to Franchisee by operation of this Agreement unless otherwise agreed to by waste generator and Franchisee. Subject to the provisions of this Agreement, Franchisee shall have the right to retain any benefit resulting from its right to retain, Recycle, process, dispose of, or use the refuse, construction and demolition waste which it collects. Refuse, construction and demolition waste,

or any part thereof which is Disposed of at a Disposal site or sites (whether landfill, transformation facility, transfer station, or material recovery facility) shall become the property of the owner or operator of the disposal site(s) once deposited there by Franchisee.

3.7 Conversion to Class II Franchise

If at any time during the term of this Agreement, or extension thereof, Franchisee collects more than 70,000 tons of Solid Waste per year within the City of San Diego, as determined through a review of Franchisee's four most recent quarterly franchise reports, Franchisee may request that its Class I Franchise and Agreement be converted to a Class II Franchise and Agreement. If Franchisee collects more than 75,000 tons of Solid Waste per year, as determined through a review of Franchisee's four most recent quarterly franchise reports, Franchisee shall request that its Class I Franchise and Agreement be converted to a Class II Franchise and Agreement within sixty (60) days of written notice by City that Franchisee's tonnages have exceeded the Class I tonnage limitation. Both permissive and mandatory Franchise conversion applications shall be made and reviewed in accordance with the processes described in San Diego Municipal Code sections 66.0112 and 66.0114 respectively and are subject to City Council approval.

Notwithstanding San Diego Municipal Code Section 66.0114 which authorizes applications for franchises to be accepted only during designated application periods, applications for the conversion of a Class I franchise to a Class II franchise may be submitted at any time Franchisee meets the criteria listed above and must be submitted within sixty (60) days of the written notice from the City described above. Conversion of a Class I Franchise to a Class II Franchise shall not be unreasonably refused.

ARTICLE 4 AGREEMENT

4.1 Grant of Agreement

City hereby grants to Franchisee a non-exclusive Class I Solid Waste Collection Franchise authorizing Franchisee to engage in the business of collecting, and subsequently transporting, disposing and/or Recycling of Solid Waste accumulated or produced in the City and to use the public streets and rights-of-way for such purpose. This grant is pursuant to Franchisee's application for the Franchise, which application is incorporated herein by this reference. Franchisee is subject to the terms and conditions specified in Sections 103 & 105 of the Charter of the City, the provisions of Article 66.0101 et seq. of the San Diego Municipal Code, the terms and conditions specified in all related resolutions, and the terms and conditions of this Agreement and the representations and assurance in Franchisee's application for the Franchise.

Under the terms of this Franchise, the Franchisee has the authority to collect multi-family residential, commercial and industrial Solid Waste. The Franchisee is also granted the authority to collect residential Solid Waste from residences which are exclusively on private streets. The grant of authority to collect certain refuse is limited to San Diego Municipal Code Section 66.0127 which requires the City to collect certain Solid Waste.

Any Franchisee providing residential or non-residential Solid Waste collection under the terms of this Agreement shall be required to either (1) ensure that Recycling services are made available for all customers either directly or by arrangement with another Recyclable Materials Collector or (2) at a minimum, provide customers with a current list of Recyclable Materials Collectors providing service in the area.

Collection routes shall be designed so as not to cross two or more jurisdictional boundaries and for the purpose of the Franchise granted herewith, shall be located exclusively within the City's jurisdictional boundary to the extent practical by operations of Franchisee. In the event Franchisee demonstrates to the Director it is unable to meet this requirement, the Franchisee shall use an allocation method as determined by the Director to properly allocate the tonnage within each multi-jurisdictional load to the appropriate jurisdictions. Additionally, Franchisee shall provide to the Director with each quarterly tonnage report information deemed necessary by the Director in order to validate the tonnages reported by Franchisee including, but not limited to, for each multi-jurisdictional load: 1) number of collection points, bin size, and frequency of collection, by jurisdiction, and 2) total tonnage of each multi-jurisdictional load.

4.2 Franchise Fee

Franchisee agrees to pay to the City a Class I Franchise Fee, equal to \$1.00 per ton less than the Council approved Franchise Fee payable by Class II Franchisees, on all Solid Waste collected in the City, regardless of the location of the Disposal site. The Franchise Fee may be modified in the amount and manner of payment at anytime during the term of this Agreement by a resolution of the City Council. Notwithstanding the above, for purposes of calculating the Franchise Fee owed to the City, Recyclable Materials, as defined in this Agreement, will not be counted as Solid Waste so long as the material is source-separated at the point of generation and is diverted from disposal and/or incineration as Solid Waste in accordance with AB 939 guidelines even if the generator is charged a fee for the service. Material of potential economic value mixed with Solid Waste, collected, and transported to a materials recovery facility or any other facility where the material is subsequently sorted or separated for the purpose of Recycling or reuse, shall be counted as Solid Waste and subject to the Franchise Fee.

4.3 Franchise Fee Payment

- A. *City of San Diego Invoice.* Following the end of each calendar year quarter, Franchisee shall receive from the City an invoice specifying the amount, by weight, of solid waste collected within the City and disposed of at the Miramar Landfill during the quarter. Franchisee shall, for the same period, specify on the invoice the amount of solid waste, by weight, collected in the City and transported to facilities other than the Miramar Landfill.
- B. *Timing of Franchise Fee Payments.* On or before the twentieth (20th) day of each month following the end of a calendar year quarter, during the term of this Agreement, Franchisee shall remit to the City Treasurer a sum of money, as provided in Section 4.2, as a Franchise Fee payment for tonnages collected in the City during the preceding

quarter. Payments must be paid in full and clearly identified by having the City of San Diego's invoice copy attached, and/or invoice number specified on the check or money order. Payment received after the due date will be considered delinquent and subject to penalties including late fee assessments and/or revocation of franchise privileges. If the Franchise Fee payment is not received by the City Treasurer's Office on or before the twentieth (20th) day of any month following the end of a calendar year quarter, Franchisee shall pay to City a late payment fee in an amount equal to ten percent (10%) of the amount owing for that quarter. Franchisee shall pay an additional one percent (1%) owing on any unpaid balance for each month or part thereof following the initial thirty (30) day period the Franchise Fee remains unpaid. City may lawfully include any Franchise Fees and/or penalties remaining unpaid in the amounts which Franchisee may owe City for disposal fees.

ARTICLE 5

SOLID WASTE COLLECTION SERVICES

5.1 General

The work to be done by Franchisee pursuant to this Agreement shall include the furnishing of all labor, supervision, equipment, materials, supplies, and all other items necessary to perform the services required. The enumeration of, and specification of requirements for, particular items of labor or equipment shall not relieve Franchisee of the duty to furnish all others, as may be required, whether enumerated or not.

The work to be done by Franchisee pursuant to this Agreement shall be accomplished in a manner so that the residents and businesses receiving services from Franchisee are provided reliable, courteous and high-quality collection and/or diversion services at all times. The enumeration of, and specification of requirements for, particular aspects of service quality shall not relieve Franchisee of the duty of accomplishing all other aspects in the manner provided in this Article, whether such other aspects are enumerated elsewhere in the Agreement or not. A Franchisee may refuse service to any customer for failure to pay his/her bill or for any substantial refusal to comply with the requirements of Section 66.0126 of the Municipal Code or with collection rules and regulations after giving the customer an opportunity to comply. The Director shall be notified of these service refusals concurrently with the customer.

5.2 Commercial, Industrial, and Multi-Family Dwelling Units

Franchisee shall collect Solid Waste from all accounts it services, except for non-putrescible service, not less than once per week. Special consideration shall be given when determining the pick up area for commercial, industrial, and/or multi-family accounts to ensure that the flow of traffic is not impeded and that it does not result in aesthetic degradation of an area.

5.3 Residential Private Road Service

Franchisee may collect residential Solid Waste from residences which are located exclusively on private streets. The grant of authority to collect residential Solid Waste is limited by San Diego

Revised March 23, 2006

Municipal Code Section 66.0127 which requires the City to collect residential Solid Waste from residences located exclusively on private streets where a valid hold harmless agreement was in effect prior to November 7, 1986.

5.4 Residential, Commercial and Industrial Recycling

Franchisee agrees to either (1) provide or make available through separate arrangement, Recycling programs to all accounts requesting service from Franchisee or (2) at a minimum, provide customers with a current list of Recyclable Materials Collectors providing service in the area. Costs of the Recycling program shall be paid by the waste generators.

In the event that Franchisee does not meet its obligations under this Section, it shall be considered a default under Article 9 of this Agreement.

5.5 Collection Standards

- A. *Care of Private Property.* Reasonable care shall be used by the Franchisee's employees in handling all privately owned collection containers and enclosures, and all damage caused by the negligence or carelessness of the Franchisee's employees shall be promptly adjusted with the owner thereof.
- B. *Noise.* All Solid Waste collection operations shall be conducted as quietly as possible and shall conform to applicable Federal, State, County and City noise level regulations. Solid Waste collection operations shall not be conducted in or adjacent to residential areas prior to 7:00 AM or after 7:00 PM.
- C. *Record of Non-Collection.* When any Solid Waste is not collected by the Franchisee because such Solid Waste fails to meet the requirements of the San Diego Municipal Code or the Agreement, Franchisee shall leave a tag, on which is indicated the reasons for refusal to collect the Solid Waste as well as the Franchisee's address, phone number and business hours.

5.6 Litter Abatement

- A. *Minimization of Spills.* During the collection or transportation process, the Franchisee shall minimize litter spills during collection in the immediate vicinity of any Solid Waste container.
- B. *Clean Up.* During the Collection and transportation process, the Franchisee shall clean up any and all litter spilled during the Collection process.
- C. *Covering of Loads.* Franchisee shall cover all open debris boxes and compactor openings during transport from one Collection site to another (over major materials), to the Disposal site or any processing facility. No Solid Waste shall be transported to the Disposal site or any processing facility in vehicle hoppers.

5.7 Collection, Transportation and Diversion of Solid Waste

The City reserves the right, upon a determination of the City Council, that the public interest requires a Collection, transportation, or diversion program different from what Franchisee has established, to require Franchisee to make changes that would include, but not be limited to, a change in its Collection or diversion operations.

5.8 Equipment

- A. *General.* All vehicles used by Franchisee in providing Solid Waste services shall be registered with the California Department of Motor Vehicles and shall meet or exceed all legal standards. Franchisee agrees to maintain all of its collection vehicles in compliance with the provisions of the California Vehicle Code.
- B. *Vehicle Identification.* Franchisee's name, local telephone number, and a unique vehicle identification number designated by Franchisee for each vehicle shall be prominently displayed on all vehicles. Additionally, every vehicle used for Collection in the City shall prominently display an identification decal provided by the City, designating the Franchisee as such. Such decal shall be effective for the term of the Agreement and shall be removed if the Franchise is terminated or the vehicle is sold, transferred or taken out of service.
- C. *Bin Identification.* Franchisee's name, local telephone number, and a unique identification number shall be placed on all front load bins and roll-off boxes used for storage and Collection within the City. Residential style automated carts shall contain, at a minimum, the Franchisee's name and a distinct logo or identification number.
- D. *Cleaning and Maintenance.*
 - 1 General. Franchisee shall maintain all of its properties, facility (ies), and equipment used in providing service under this Agreement in a safe, neat, clean and operable condition at all times. Each truck shall be designed so that Solid Waste, oil, or grease will not blow, fall, or leak out of the truck onto the street. All Solid Waste shall be transported by means of vehicles equipped with watertight bodies fitted with close fitting covers.

- 2 Cleaning. Vehicles used in the collection of Solid Waste shall be washed on a regular basis so as to present a clean appearance and minimize odors.
 - 3 Inventory. Franchisee shall annually furnish to City a current vehicle inventory.
 - 4 Storage. Franchisee shall arrange to store all vehicles and other equipment at location(s) in accordance with City's applicable zoning regulations, if stored within the City.
- E. *Operation.* Vehicles shall be operated in compliance with the California Vehicle Code, and all applicable safety and local ordinances. Franchisee shall not load vehicles in excess of the manufacturer's recommendations or limitations imposed by state or local weight restrictions on vehicles.

5.9 Franchisee Provided Solid Waste Containers

- A. *General.* Containers used for storage of Solid Waste shall be designed and constructed to be watertight and prevent the leakage of liquids. All Containers shall be painted the Franchisee's standard color and shall prominently display the name and telephone number of the Franchisee.
- B. *Cleaning, Painting, Maintenance.* Franchisee shall replace, clean or repaint all containers as needed so as to present a clean appearance. Franchisee shall make a good faith effort to do the same upon 48 hours notice by Director.

5.10 Personnel

- A. *Driver Qualifications.* All drivers shall be trained and qualified in the operation of Collection vehicles and must have in effect a valid license, of the appropriate class, issued by the California Department of Motor Vehicles.
- B. *Safety Training.* Franchisee shall provide suitable operational and safety training for all of its employees who utilize or operate vehicles or equipment for Collection of Solid Waste, or who are otherwise directly involved in such Collection.
- C. *Employee Conduct.* Franchisee shall use its best efforts to ensure that all employees present have a neat appearance and conduct themselves in a courteous manner in their dealings with customers and the general public.

5.11 Hazardous Waste

Franchisee agrees to establish and vigorously enforce an educational program which will train Franchisee's employees in the identification and proper handling of Hazardous Waste. Franchisee's employees shall not knowingly place such Hazardous Waste in the Collection vehicles, nor knowingly dispose of such Hazardous Wastes at a processing facility or Disposal site.

If the Franchisee determines that Solid Waste placed in any container for Collection or delivered to any facility is Hazardous Waste, infectious waste or other waste that may not legally be disposed of at the Disposal site or presents a hazard to Franchisee's employees, the Franchisee shall have the right to refuse to accept such waste. The customer will be contacted by the Franchisee and requested to arrange proper disposal.

If the Hazardous Waste is delivered to a City Disposal site before its presence is detected and the customer cannot be identified after the best efforts of the City and Franchisee to identify customer, the City shall arrange for its proper disposal at the expense of Franchisee. This expense shall be limited to the direct disposal cost of any manifested load required to remove the Hazardous Waste. Alternatively, Franchisee will have 5 business days after receipt of written notice to make its own arrangements for the removal of the Hazardous Waste subject to City review and approval of such arrangements.

ARTICLE 6 OTHER COLLECTION-RELATED SERVICES

6.1 Service Complaints

Franchisee agrees to maintain a written log of all oral and written service complaints registered with the Franchisee from customers within the City during the term of the Franchise. Franchisee shall be responsible for the prompt and courteous attention to, and prompt and reasonable resolution of, all customer complaints. Franchisee shall retain records of all service complaints for a minimum of one (1) year and make copies available to City upon request.

6.2 Non-Discrimination

Franchisee shall not discriminate in the provision of service or the employment of persons engaged in performance of the Agreement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or gender of such persons or as otherwise prohibited by law. Franchisee's charges for all services shall be non-discriminatory and uniform for equal services rendered.

6.3 Report Accumulation of Solid Waste: Unauthorized Dumping

Franchisee shall cooperate with the City in its efforts to provide a clean environment by directing its drivers to note (1) the addresses of any premises at which they observe that Solid Waste is accumulating and is not being delivered for collection; and (2) the address, or other location description, at which Solid Waste has been dumped in an apparently unauthorized manner. Franchisee shall deliver the address or description of such observations to the Director in a timely manner in order to protect public health, safety and welfare.

ARTICLE 7 RECORDS AND REPORTS

7.1 General

Franchisee agrees to maintain and report to the Director with such accounting, statistical and other records or documents related to its performance under this Agreement and as necessary for the City to: 1) fulfill its obligations under AB 939, as it exists on the date of execution of this Agreement and as it may be amended from time-to-time, and other applicable laws and regulations; 2) meet its Solid Waste program management needs and reporting requirements; and 3) reconcile the accuracy of Franchise Fee payments as described in Section 4.2.

By the twentieth (20th) of each month following the end of a calendar year quarter, Franchisee shall submit to the Director a Quarterly Report using the report form(s) and/or format(s) approved by Director and provided to Franchisee in accordance with Section 10.10. Quarters end on March 31, June 30, September 30, and December 31 of each calendar year.

Each report shall include a certification executed by an authorized officer of the Franchisee, in substance, as follows: "I declare, under the penalty of perjury, that this statement is made by me, that I am authorized to make such statement on behalf of Franchisee, and to the best of my knowledge and belief, it is a true, correct and complete statement made in good faith for the quarter stated herein." Franchisee may propose report formats that are responsive to the needs of the City. The format of each report shall be approved by City. With the written direction or approval of City, and after Franchisee is given an opportunity to review and comment, the records and reports to be maintained and provided by Franchisee may be adjusted in number, format or frequency.

Franchisee shall retain copies of all collection, recycling and disposal records for a minimum of three (3) years following the date of billing, for inspection and verification by the City or its agents, at any reasonable time upon request and shall cooperate with the City in any audits or investigations of such records. Records shall be in chronological order and organized in a form which is readily and easily interpreted.

All reports shall be submitted to:

City of San Diego
Environmental Services Department
Attention: Franchise Administrator
9601 Ridgehaven Court, Suite 210
San Diego, CA 92123-1636

Failure of Franchisee to comply with the reporting requirements as set forth in this section shall result in a late penalty charge of \$100 (one hundred dollars) for each month or part thereof past the due date. Franchisee's repeated failure to submit reports, and/or failure to submit reports on time, may result in additional penalties and/or revocation of Franchise privileges at the discretion of the City Manager.

7.2 Audit and Inspection by City

At a mutually agreed upon time during normal business hours, but within five (5) working days of the initial request, Franchisee shall make available to the City for examination at reasonable locations within the City/County of San Diego only the Franchisee's data and records with respect to the matters covered by this Agreement. Franchisee will permit the City Auditor to audit, examine, and make excerpts or transcripts from such data and records, and make audits of all data relating to all matters covered by this Agreement. Franchisee shall maintain such data and records in an accessible location and condition for a period of not less than three years following the City's receipt of final payment under this Agreement unless the City agrees in writing to an earlier disposition.

In the event a City audit discloses that the Franchise Fee for the audited period(s) has been underpaid in excess of five percent (5%) of the total required fee, then Franchisee shall pay the City the cost of the audit. Failure to provide the City Auditor with access to the records required to conduct audits under this Agreement are a breach subject to revocation of this Franchise.

7.3 Solid Waste Composition Studies

Franchisee agrees to cooperate with the City on all future waste composition studies, at no additional cost to the City, including but not limited to, modification of routes or collection of individual accounts identified by the Director for purposes of obtaining desired waste composition data.

Franchisee further agrees to deliver a reasonable number of targeted loads to a nearby location or locations specified by the Director as reasonably agreed by Franchisee for purposes of conducting waste composition analysis.

ARTICLE 8 INDEMNITY, INSURANCE, BOND

8.1 Indemnification of City

A. Indemnification Generally

Separate and distinct from the insurance and default provisions found in this Agreement, Franchisee agrees to defend, with counsel to be agreed upon by both parties, indemnify, and hold harmless, the City and its elected officials, agents, officers, servants, and employees from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to the City's employees, agents or officers which arise from, or are connected with, or are caused or claimed to be caused by acts or omissions of Franchisee, or its agents, officers or employees, in the performance of the non-exclusive Franchise Agreement, or in performing the work or services therein, and all costs and expenses of investigating and defending against same; provided, however, that Franchisee's duty to indemnify and hold harmless shall not include any claims or liability arising from the established sole negligence, active

negligence, or sole willful misconduct of the City, its agents, officers, or employees.

B. Hazardous Materials Indemnification

For solid waste collected by Franchisee and transported to a non-City landfill, Franchisee shall indemnify, defend, with counsel to be agreed upon by both parties, protect and hold harmless the City, its elected officials, officers, employees, agents, assigns and any successor or successors to the City's interest from and against all claims, actual damages (including but not limited to special and consequential damages), natural resources damages, punitive damages, injuries, costs, response, remediation and removal costs, losses, demands, debts, liens, liabilities, causes of action, suits, legal or administrative proceedings, interest, fines, charges, penalties and expenses (including but not limited to attorneys and expert witness fees and costs incurred in connection with defending against any of the foregoing or in enforcing this indemnity) of any kind whatsoever paid, incurred or suffered by, or asserted against, the City or its officers, employees, or agents arising from or attributable to any repair, cleanup or detoxification, or preparation and implementation of any removal, remedial, response, closure or other plan (regardless of whether undertaken due to government action) concerning any Hazardous Waste or Hazardous Substance or hazardous wastes at any disposal or processing facility where solid waste is or has been transported, transferred, processed, stored, disposed of or has otherwise come to be located by Franchisee or its activities pursuant to this Agreement resulting in a release of any hazardous substance into the environment.

C. Additional Information

Without limiting the substance of this indemnification, the foregoing indemnity is intended to operate as an Agreement pursuant to 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, "CERCLA," also known as "Superfund," 42 U.S.C. § 9607(e), and California Health and Safety Code § 25364, to defend, protect, hold harmless and indemnify the City from all forms of liability under CERCLA, other applicable statutes or common law for any and all matters addressed in this provision. This provision shall survive the expiration of the term of this Agreement.

The requirements of this Section 8.1B need not be separately insured or bonded by Franchisee. The only security for the performance of this Section is the bonds required by Section 8.3. The City accepts the otherwise unsecured indemnification covenant of Franchisee set forth in this Section.

Any other indemnification agreement covering the same subject matter of which the City is beneficiary shall be primary to the indemnification agreement of this Section.

D. City Provided Indemnification

Notwithstanding anything to the contrary in this agreement, upon the Effective Date of

the Agreement, the City shall indemnify, defend with counsel to be agreed upon by both parties, protect and hold harmless Franchisee, its officers, directors, employees, agents, assigns and any successors to Franchisee's interest, from and against all claims, actual damages (including but not limited to special and consequential damages), natural resources damages, punitive damages, injuries, costs, response, remediation and removal costs, losses, demands, debts, liens, liabilities, causes of action, suits, legal or administrative proceedings, interest, fines, charges, penalties and expenses (including but not limited to attorneys and expert witness fees and costs incurred in connection with defending against any of the foregoing or in enforcing this indemnity) of any kind whatsoever paid, incurred or suffered by, or asserted against, Franchisee or its officers, employees or agents arising from or attributable to any repair, cleanup or detoxification or preparation and implementation of any removal, remedial, response, closure or other plan (regardless of whether undertaken due to government action) concerning any Hazardous Substance or Hazardous Waste arising from any Disposal Site owned by the City, including without limitation the Miramar Landfill.

E. Additional Information/City Indemnification

Without limiting the substance of this indemnification, the foregoing indemnity is intended to operate as an agreement pursuant to 107 (e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); also known as "Superfund," 42 U.S.C. § 9607(e), and California Health and Safety Code §25364, to defend, protect, hold harmless and Indemnify Franchisee from all forms of liability under CERCLA, other applicable statutes or common law for any and all matters addressed in this provision. This provision shall survive the expiration of the term of this Agreement.

8.2 Insurance

A. *Minimum Scope of Insurance.* Coverage shall be at least as broad as:

1. Commercial General Liability and Insurance Services Office covering Broad Form Comprehensive General Liability.
2. Commercial Automobile Liability Policy with coverage for pollution liability.
3. Worker's compensation insurance as required by the Labor Code of the State of California with a minimum of \$1,000,000 of Employer's Liability coverage.

B. *Minimum Limits of Insurance.* Franchisee shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 combined single limit per occurrence for bodily injury and property damage.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.

3. Worker's Compensation and Employers Liability: Worker's Compensation limits of \$1,000,000 as required by the Labor Code of the State of California.
- C. *Deductibles and Self-Insured Retentions.* All deductibles or self-insured retentions in excess of ten thousand dollars (\$10,000) must be declared to and approved by the City's Risk Manager. At the option of the City's Risk Manager, either: the insurer shall reduce or eliminate such deductibles or self insured retentions as respects the City, its elected officials, employees, agents or volunteers; or the Franchisee shall procure an additional letter of credit or bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses.
- D. *Other Insurance Provisions.* The policies are to contain, or be endorsed to contain, the following provisions:
1. General Liability and Automobile Liability Coverages
 - a. All insurance coverage required by this Agreement shall be obtained by Franchisee from insurers authorized to conduct business in the State of California, which are rated at least "A-, VI" or better by the current AM Best Rating Guide and which are approved by City. Non-admitted, surplus lines carriers may be accepted provided that they are included in the most recent California List of Eligible Surplus Lines carriers (LESLI list) and are otherwise acceptable to the City. The insurance policies shall provide that the policies shall remain in full force during the life of this Agreement and shall not be canceled, terminated or allowed to expire without thirty (30) days prior written notice to the City from the insurance company.
 - b. The City, its elected officials, officers, employees, agents, representatives and volunteers shall be named as additional insureds on the Commercial General Liability, Commercial Auto liability and Pollution coverages pursuant to separate endorsement, CG2010 (11/85) or equivalent.
 - c. The Franchisee's insurance coverage shall be primary insurance as respects the City, its elected officials, officers, employees, agents, representatives, and volunteers. Any insurance or self-insurance maintained by the City, its elected officials, officers, employees, agents, representatives or volunteers shall be in excess of the Franchisee's insurance and shall not contribute with it. This shall be reflected in a separate endorsement to the liability coverages.
 - d. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its elected officials, officers, employees, agents, representatives or volunteers.
 - e. Coverage shall state that the Franchisee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

- f. Policies shall be written on an occurrence form; if, due to unavailability or market condition, a “claims made” form is utilized, the retro date must be on or before the date of commencement of this Agreement and coverage must be maintained for a period of at least one year after the termination of this Agreement.
- 2. Worker’s Compensation and Employers Liability Coverage:
The insurer shall agree to waive all rights of subrogation against the City, its elected officials, employees and volunteers for losses arising from work performed by the Franchisee in the City and this shall be reflected in a separate endorsement.
- E. *Acceptability of Insurers.* All insurance coverage required by this Agreement shall be obtained by Franchise from insurers authorized to conduct business in the State of California, which are rated at least “A-, VI” or better by the current AM Best Rating Guide and which are approved by City. Non-admitted, surplus lines carriers may be accepted provided that they are included in the most recent California List of Eligible Surplus Lines carriers (LESLI list) and are otherwise acceptable to the City.
- F. *Required Endorsements.* Each insurance policy shall contain appropriate endorsements, as specified by the City.
- G. *Delivery of Proof of Coverage.* Simultaneously with the execution of this Agreement, Franchisee shall furnish the City certificates of each policy of insurance required hereunder, in form and substance satisfactory to the City, as well as copies of all required endorsements. Renewal certificates shall be furnished to the City upon each policy renewal to demonstrate maintenance of the required coverages throughout the term of the Agreement.

8.3 Faithful Performance Bond

Simultaneously with the execution of this Agreement and all extensions of the Agreement, Franchisee shall file with the City and at all times thereafter maintain in full force and effect for the term of the Franchise and all extensions thereof, at the Franchisee’s sole expense, a corporate surety bond payable to the City, executed by a corporation authorized to transact surety insurance in the State of California. The principal sum of the bond shall be twenty thousand dollars (\$20,000). The bond shall be renewable annually, and conditioned upon the faithful performance of the Franchisee, and upon the further condition that in the event the Franchisee shall fail to comply with any one or more of the provisions of the Agreement, any waste delivery agreement, AB 939 provisions, late fees, penalties or fines, there shall be recoverable jointly and severally from the principal and surety of such bond any damages or loss suffered by the City as a result thereof, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of the Franchisee, plus a reasonable allowance for attorney’s fees and costs, up to the full amount of the bond, such condition to be a continuing obligation for the duration of the Franchise and thereafter until the Franchisee has liquidated all

of its obligations with the City which may have arisen from the acceptance of the Franchise by the Franchisee. The bond shall provide that thirty (30) days' prior written notice of intention not to renew, cancellation, or material change be given to the City.

In the alternative, Franchisee may, at the City Manager's sole discretion, deposit an irrevocable letter of credit, deposit cash with the City Treasurer or open a certificate of deposit in the name of the City to be held to secure faithful performance of this Agreement in the amount of twenty thousand dollars (\$20,000). Any such alternative to the performance bond shall be with a financial institution and in a form approved by the City Manager.

ARTICLE 9 DEFAULT AND REMEDIES

9.1 Events of Default

Each of the following shall constitute an event of default ("event of default") hereunder:

- A. *Failure to Perform.* Franchisee fails to perform any of its material obligations under this Agreement, as it may be amended from time to time.
- B. *Misrepresentation.* Any misrepresentation or disclosure made to the City by the Franchisee in connection with or as an inducement to entering this Agreement or any future amendment to this Agreement, which proves to be false or misleading in any material respect as of the time the representation or disclosure is made, whether or not any such representation or disclosure appears as part of this Agreement.
- C. *Seizure or Attachment.* There is a seizure or attachment of (other than a prejudgment attachment), or levy affecting possession on, the operating equipment and facilities of such proportion as to substantially impair the Franchisee's ability to perform under this Agreement and which cannot be released, bonded, or otherwise lifted within seventy-two (72) hours, excluding weekends and holidays.
- D. *Financial Insolvency.* Franchisee files a voluntary petition for debt relief under any applicable bankruptcy, insolvency, debt or relief, or other similar law now or hereafter in effect, or consents to the appointment of or taking of possession by a receiver, liquidator, assignee (other than as a part of a transfer of equipment no longer useful to Franchisee or necessary for this Agreement), trustee (other than as security for an obligation under a deed of trust), custodian, sequestrator (or similar official) for any part of the Franchisee's operating assets or any substantial part of the Franchisee's property, or makes any general assignment for the benefit of the Franchisee's creditors, or shall fail generally to pay the Franchisee's debts as they become due or shall take any action in furtherance of any of the foregoing.

- E. *Court Decisions.* Any court having jurisdiction shall enter a decree or order for relief in respect of the Franchisee, in any involuntary case brought under any bankruptcy, insolvency, debt or relief or similar law now or hereafter in effect, or the Franchisee shall consent to or shall fail to oppose any such proceeding, or any such court shall enter a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestration (or similar official) of the Franchisee or for any part of the Franchisee's operating equipment or assets, or order the winding up or liquidation of the affairs of Franchisee.
- F. *Fraud or Deceit.* If the Franchisee practices, or attempts to practice, any fraud or deceit upon the City.
- G. *Failure to Maintain Coverage.* If the Franchisee fails to provide or maintain in full force and effect the Worker's Compensation, liability, or indemnification coverage as required by this Agreement.
- H. *Violations of Regulation.* If the Franchisee violates any permits, orders or filing of any regulatory body having jurisdiction over the Franchisee which violation or non-compliance materially affects the Franchisee's ability to perform under this Agreement, provided that the Franchisee may contest any such orders or filings by appropriate proceedings conducted in good faith, in which case no breach of the Franchise shall be deemed to have occurred during the pendency of the contestation or appeal, to the extent the Franchisee is able to adequately perform during that period.
- I. *Acts or Omissions.* Any other act or omission by Franchisee which materially violates the terms, conditions, or requirements of this Agreement, AB 939, as it may be amended from time to time, or any order, directive, rule, or regulation issued thereunder and which is not corrected or remedied within the time set in the written notice of the violation or, if the Franchisee cannot reasonably correct or remedy the breach within the time set forth in such notices, if the Franchisee should fail to commence to correct or remedy such violation within the time set forth in such notice and diligently effect such correction or remedy thereafter.
- J. *Termination of Service.* In the case of a breach related to the above sections, and the breach continues for more than thirty (30) calendar days after written notice from the Director for the correction thereof, provided that where such breach cannot be cured within such thirty (30) day period, the Franchisee shall not be in default of this Agreement if Franchisee shall have commenced such action required to cure the particular breach within ten (10) calendar days after such notice, and it continues such performance diligently until completed.

9.2 Dispute Resolution

A Franchise may be suspended or revoked by the Manager when the Franchisee violates any provision of this agreement or any rule or regulation promulgated by the Manager. Written

notice of suspension or revocation of the Franchise shall be served personally or by registered or certified mail, postage prepaid, to the last place of business or residence of the franchisee and the Franchisee shall cease operations under its license within ten (10) days after receipt of said notice unless the Franchise has been reinstated by the Manager or an appeal hearing before the City Council is requested by the Franchisee prior to expiration of said ten (10) day period. In the event that such an appeal hearing is requested, said Franchisee may continue collecting and transporting or disposing of refuse until the City Council has rendered its decision on the suspension or revocation of the Franchise. Any person whose Franchise has been revoked or suspended has the right to an appeal hearing before the City Council. A request in writing shall be made to the City Clerk within ten (10) calendar days after receipt of notice or suspension or revocation, and the appeal hearing shall be held not later than fourteen (14) days following the receipt of the written request. Written notice of the time, date and place of the appeal hearing shall be given by the City Clerk to the Franchisee and to the Manager. The City Council shall render its decision within fifteen (15) days after the close of the appeal hearing and its decision shall be final.

9.3 Right to Terminate Upon Default

Upon a default by Franchisee, and after the completion of the process described in Section 9.2, the City shall have the right to terminate this Agreement without need for any additional hearing, suit or legal action.

9.4 City's Remedies Cumulative: Specific Performance

The City's right to terminate the Agreement under Section 9.2 is not exclusive, and the City's termination of the Agreement shall not constitute an election of remedies. Instead, they shall be in addition to any and all other legal and equitable rights and remedies which the City may have. By virtue of the nature of this agreement, the urgency of timely, continuous and high quality service, the lead time required to effect alternative service, and the rights granted by the City to the Franchisee, the remedy of damages for a breach hereof by the Franchisee may be inadequate and the City shall be entitled to injunctive relief.

9.5 Excuse from Performance

The parties shall be excused from performing their respective obligations hereunder in the event they are prevented from so performing by reason of floods, earthquakes, other "acts of God," war, civil insurrection, riots, acts of any government (including judicial action), and other similar catastrophic events which are beyond the control of and not the fault of the party claiming excuse from performance hereunder. Labor unrest, including but not limited to strike, work stoppage or slowdown, sick-out, picketing, or their concerted job action conducted by Franchisee's employees or directed at Franchisee is not an excuse from performance and Franchisee shall be obligated to continue to provide service notwithstanding the occurrence of any or all of such events; provided, that in the case of labor, unrest or job action directed at a third party (e.g., customer) over whom the Franchisee has no control, the inability of the Franchisee to make collections due to the unwillingness or failure of the third party to provide reasonable assurance of the safety of Franchisee's employees while making collections or to make reasonable accommodations with respect to container placement and point of delivery, time of collection or

other operating circumstances to minimize any confrontation with pickets or the number of persons necessary to make collections shall, to that limited extent, excuse performance and provided further that the foregoing excuse shall be conditioned on the Franchisee's cooperation in making collection at different times and in different locations.

The party claiming excuse from performance shall, within two (2) working days after such party has notice of such cause, give the other party notice of the facts constituting such cause and asserting its claim to excuse under this Section. Notwithstanding, Franchisee in the event of a catastrophic event shall comply with the City's emergency preparedness plan.

In the event that either party validly exercises its rights under this Section, the parties hereby waive any claim against each other for any damages sustained thereby.

Notwithstanding the foregoing however, (1) the existence of an excuse from performance will not affect the City's rights under this Section; and (2) if Franchisee is excused from performing its obligations hereunder for any of the causes listed in this Section for a period of thirty (30) days or more, other than as the result of third party labor disputes where service cannot be provided for reasons described earlier in this Section, the City shall nevertheless have the right, in its sole discretion, to terminate this Agreement by giving ten (10) working days notice, in which case the provisions of Section 9.2 will apply.

ARTICLE 10 OTHER AGREEMENTS OF THE PARTIES

10.1 Relationship of Parties

The parties intend that the Franchisee shall perform the services required by this Agreement as an independent Franchisee and not as an officer or employee of the City nor as a partner of or joint venturer with the City. No employee or agent of the Franchisee shall be or shall be deemed to be an employee or agent of the City. Except as expressly provided herein, the Franchisee shall have the exclusive control over the manner and means of conducting the Solid Waste Collection services performed under this Agreement, and all persons performing such services. Franchisee shall be solely responsible for the acts and omissions of its officers, employees, subcontractors and agents, and such persons shall not obtain any rights to retirement benefits, worker's compensation benefits, or any other benefits which accrue to the City employees by virtue of their employment with the City.

Franchisee shall agree that this Agreement is not made in the interest of, or on behalf of, any undisclosed person, partnership, Franchisee, association, organization, or corporation. Franchisee has not directly or indirectly colluded, conspired, connived or agreed with any person, partnership, Franchisee, association, organization, or corporation to secure any advantage against the City.

10.2 Compliance with Law

In providing the services required under this Agreement, Franchisee shall at all times, at its sole

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cost, comply with all applicable laws of the United States, the State of California, the City and other states or counties which may have jurisdiction over any service provided in this Agreement and with all applicable regulations promulgated by any federal, state, regional or local administrative and regulatory agency, now in force and as they may be enacted, issued or amended during the term of this Agreement.

10.3 Governing Law

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California and the United States.

10.4 Jurisdiction

Any lawsuits between the parties arising out of this Agreement shall be brought and concluded in the courts of the State of California which shall have exclusive jurisdiction over such lawsuits. With respect to venue, the parties agree that this Agreement is made in and will be performed in the City of San Diego, County of San Diego and State of California. Federal courts may have jurisdiction over certain lawsuits arising from this Agreement and these should be brought and concluded within the federal system.

10.5 Assignment

Franchisee acknowledges that this Agreement involves rendering a vital service to City residents and businesses, and that the City has franchised Franchisee to perform the services specified herein based on (1) Franchisee's experience, skill and reputation for conducting its Solid Waste management and/or Recycling operations in a safe, effective and responsible fashion, at all times in keeping with applicable waste management laws, regulations and good Solid Waste management practices, and (2) Franchisee's financial resources to maintain the required equipment and to support its indemnity obligations to City under this Agreement. City has relied on each of these factors, among others, in choosing Franchisee to perform the services to be rendered by Franchisee under this Agreement.

Any Franchise granted pursuant to this division is a privilege to be held in trust by the original Franchisee. A Franchise issued under this division shall not be transferred, sold, leased, assigned, relinquished, or delegated to another person, either in whole or in part, whether by forced sale, merger, consolidation, bankruptcy laws or otherwise, without the prior approval of the City Council. This restriction includes the transfer of ownership of the Franchise, or a majority of the ownership or control of the Franchisee, or the conveyance of a majority of the Franchisee's stock to a new controlling interest. Franchises shall become void upon the abandonment of same by the Franchisee. The City Council shall not unreasonably withhold approval of a Franchise assignment, provided that such assignment does not unreasonably impact competition and that the assignee is qualified to perform its obligations as required by this Franchise Agreement and any implementing City ordinance.

Notwithstanding the above, no Franchise shall be transferred or assigned unless all City accounts are current and no monies are due to City.

10.6 Binding on Successors

The provisions of this Agreement shall inure to the benefit of and be binding on the successors and permitted assigns of the parties.

10.7 Parties in Interest

Nothing in this Agreement, whether express or implied, is intended to confer any rights on any persons other than the parties to it and their representatives, successors and permitted assigns.

10.8 Waiver

The waiver by either party of any breach or violation of any provisions of this Agreement shall not be deemed to be a waiver of any breach or violation of any other provision nor of any subsequent breach or violation of the same or any other provision.

The subsequent acceptance by either party of any monies which become due hereunder shall not be deemed to be a waiver of any preexisting or concurrent breach or violation by the other party of any provision of this Agreement.

10.9 Franchisee's Investigation

Franchisee has made an independent investigation (satisfactory to it) of the conditions and circumstances surrounding the Agreement and the work to be performed by it.

10.10 Notice

All notices, demands, request, proposals, approvals, consents and other communications which this Agreement requires, authorizes or contemplates shall, except as otherwise specifically provided, be in writing and shall be effective when personally delivered to a representative of the parties at the address below or deposited in the United States mail, first class postage prepaid, addressed as follows:

If to the City:

Attention: City of San Diego
Environmental Services Director
9601 Ridgehaven Court, Suite 210
San Diego, CA 92123-1636

If to the Franchisee:

The address to which communications may be delivered may be changed from time to time by a notice given in accordance with this Section.

10.11 Representative of the Parties

As allowed by the San Diego Municipal Code and the City Charter, all actions to be taken by the

City related to this Agreement shall be taken by the Manager except as provided below. The Manager may delegate, in writing, authority to other City officials and may permit such officials, in turn, to delegate in writing some or all of such authority to subordinate officers. Franchisee may rely upon actions taken by such delegates if they are within the scope of the authority properly delegated to them.

- A. The Director shall be responsible for administration of this Agreement on behalf of the City.
- B. The Director may delegate authority to an appropriate City employee or other appropriate person.
- C. The Manager reserves to himself or herself all discretionary and administrative authority not otherwise expressly delegated pursuant to this Agreement. Whenever this Agreement requires approval by the City, the approval may be given by the Manager.

Franchisee shall, by the Effective Date, designate in writing a responsible officer who shall serve as the representative of the Franchisee in all matters related to the Agreement and shall inform the City in writing of such designation and of any limitations upon his/her authority to the Franchisee. The City may rely upon action taken by such designated representative as action of the Franchisee unless they are outside the scope of the authority delegated to him/her by the Franchisee as communicated to the City.

10.12 Declared State of Emergency

In the event that an authorized official declares a State of Emergency within any geographic area of the City, as authorized in Chapter 7, Division 1, Title 2 of the California Government Code (California Emergency Services Act) or U.S. Public Law 81-920 (Federal Civil Defense Act of 1950), the City will have the right to exercise all privileges and perform all services required under this Agreement, but will not be required to make prior notification to the Franchisee.

10.13 Notice

This Agreement does not affect the rights or obligations of the parties under Section 49520 through 49524 of the Public Resources Code.

10.14 Non-Discrimination in Contracting for City Service

City shall not discriminate between Class I and Class II Franchisees in the bidding, evaluating and/or awarding of contracts for solid waste collection services at City facilities.

ARTICLE 11 MISCELLANEOUS AGREEMENTS

11.1 Entire Agreement

This Agreement, including the Exhibits, represents the full and entire Agreement between the parties with respect to the matters covered herein.

11.2 Section Headings

The Article headings and Section headings in this Agreement are for convenience or reference only and are not intended to be used in the construction of this Agreement, nor to alter or affect any of its provisions.

11.3 References to Laws

All references in this Agreement to laws shall be understood to include such laws as they maybe subsequently amended or recodified, unless otherwise specifically provided.

11.4 Interpretation

This Agreement shall be interpreted and construed reasonably and neither for nor against either party regardless of the degree to which either party participated in its drafting.

11.5 Amendment

This Agreement may not be modified or amended in any respect except by a written agreement duly approved and signed by the parties.

11.6 Severability

If any nonmaterial provision of this Agreement is for any reason deemed to be invalid and unenforceable, the invalidity or unenforceability of such provision shall not affect any of the remaining provisions of this Agreement which shall be enforced as if such invalid or unenforceable provision had not been contained herein.

11.7 Counterparts

This Agreement may be executed in counterparts each of which shall be considered an original.

11.8 Exhibits

Each of the Exhibits identified is attached hereto and incorporated herein and made a part hereof by this reference.

IN WITNESS WHEREOF, City and Franchisee have executed this Agreement by and through their respective, duly authorized representatives.

AGREED TO:

Environmental Services Director
City of San Diego

Franchisee Representative

Date: _____

Date: _____

Approved as to form and legality this _____ day of _____, 2006.

MICHAEL AGUIRRE, City Attorney

By _____
Grace Lowenberg
Deputy City Attorney